

13547

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-195845

DATE: April 24, 1980

MATTER OF: Ken Com, Inc.

DIGEST:

1. Agency did not act improperly in awarding contract to second low bidder prior to expiration of bids where small business low bidder was found to be nonresponsible and Small Business Administration (SBA) was unable to process certificate of competency (COC) prior to bid expiration which was considerably beyond 15-day period for processing COC set forth in Defense Acquisition Regulation (DAR).
2. Under 15 U.S.C. 637(b)(7), SBA has authority to conclusively determine that small business concern is responsible. GAO generally will not review SBA determination to require issuance of COC or to reopen a case where COC has been denied absent prima facie showing of fraud or willful disregard of facts. Since SBA was provided opportunity to determine matter and agency properly made award, it is not appropriate for GAO to consider small business concern's responsibility.

Ken Com, Inc. (Ken Com) a small business firm and the low bidder under invitation for bids (IFB) No. N62474-78-B-0089, issued by the Naval Facilities Engineering Command, San Bruno, California (Navy), protests the Navy's determination that Ken Com was nonresponsible, and the subsequent award to Contra Costa Electric, Inc. (Contra Costa) while the Small Business Administration (SBA) was considering a certificate of competency (COC) for that firm.

The IFB was issued on April 16, 1979, as a total small business set-aside for an energy monitoring and control system for the Pacific Missile Test Center. Ken Com's bid was the lowest received on the items to

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be awarded while Contra Costa's bid was second low. The Defense Contract Administration Services Management Area, San Diego, California (DCASMA) performed a preaward survey to determine the low bidder's responsibility, and recommended that award not be made to Ken Com. Consequently on July 7 the contracting officer referred the matter to the SBA San Diego District Office pursuant to Defense Acquisition Regulation DAR § 1-705.4(c) (DAC 76-19, July 27, (1979))¹ so that Ken Com could be considered for a COC.

Initially the SBA's District Office advised the Navy by letter of July 10 that Ken Com would file for a COC and projected a decision by July 30. As a result of this information the Navy requested and received from the bidders an extension of their bid acceptance dates from July 22 to August 21. On July 27, the Navy was informed by the SBA District Office that the matter was being referred to SBA's San Francisco Regional Office and that they expected that a COC would be issued by August 6. On August 10 the Navy determined that award should be made to Contra Costa because no written information had been received from the SBA regarding the COC since the July 10 letter and the SBA had taken longer than the 15 days provided by DAR § 1-705.4(c) for processing a COC. On August 14, however, before award had been made, SBA's Regional Office informed the Navy that since the procurement exceeded \$500,000 only the SBA Central Office in Washington could issue a COC, that it would recommend that the Central Office issue a COC to Ken Com and that it expected a final decision from the Central Office by August 21. On August 21, the bid expiration date, the Navy awarded the contract to Contra Costa as a COC had not yet been issued.

DAR § 1-705.4 sets forth the procedures the Navy must follow if a bid or proposal of a small business firm is rejected for nonresponsibility. That section provides in pertinent part:

¹DAC 76-19 did not substantially change the wording of the prior version of DAR § 1-705.4.

"(a) * * * Contracting officers shall accept SBA certificates of competency as conclusive of a prospective contractor's responsibility * * * unless the contracting officer has substantial doubt as to the concern's ability to perform, in which case the procedures in (f) and (g) apply. * * *

* * * * *

"(c) If a bid or proposal of a small business concern is to be rejected because the contracting officer has determined the concern to be nonresponsible, the matter shall be referred to the appropriate SBA field office * * *. The award shall be withheld until SBA action concerning issuance of a COC or until 15 working days after the SBA is so notified, whichever is earlier * * *.

* * * * *

"(e) SBA field offices will notify the PCO [Procuring Contracting Officer] of each case where they (i) plan to issue a Certificate of Competency, or (ii) are submitting a case to SBA, Washington, D.C., for approval prior to issuance of a Certificate of Competency, and will provide the contracting officer or his designated representative with a brief written statement citing the reasons for SBA's proposed affirmative action. Prior to final SBA action, the PCO * * * will be afforded an opportunity to meet or communicate with SBA field office representatives and furnish to them new or additional information on the case. * * * Every effort should be made to resolve any differences between the SBA and the Departments through a complete exchange of pre-award information developed by each agency."

Paragraph (f)(i) provides that on the basis of new information the contracting officer may make an affirmative determination of responsibility and withdraw the COC referral. However, if agreement cannot be reached between the SBA field office and the contracting officer and a substantial doubt exists as to the ability of the contractor to perform, subsection (f) provides two alternatives:

"(ii) * * * the contracting officer shall request the SBA field office to suspend action and to forward the case to SBA, Washington, D.C. (HQ SBA), for review * * *. The 15-day period referred to in (c) shall be automatically suspended when the contracting officer requests SBA to suspend action and forward the request to HQ SBA * * *."

or,

"(iii) * * * the contracting officer may conclude it would not be practicable to appeal the case to HQ SBA nor would it be appropriate to withdraw his request for Certificate of Competency action. In that case, the contracting officer shall inform the SBA field office that it must issue a COC as a prerequisite to contract award. However, such action shall not be taken by the contracting officer without prior approval at a level above the contracting officer."

The Navy's position in this matter is relatively simple. It states that it would not have disagreed with the issuance of a COC if SBA determined one was appropriate. However, the Navy maintains that it waited for a time considerably in excess of the required 15-day period (DAR § 1-705.4(c)) and when the SBA failed to definitively inform it that a COC would be issued by the date that the extended bids were to expire it awarded the contract to the next low bidder.

Ken Com contends that the Navy's action in awarding the contract to Contra Costa while its COC application was pending before the SBA violates both the spirit and letter of the Small Business Act and the implementing DAR provisions. While the protester concedes that the Navy withheld award longer than the 15-day period normally required for processing a COC, it argues that the portion of DAR § 1-705.4(f)(ii) suspending the 15-day period for appeals to SBA Headquarters is applicable to this situation. In this regard, the protester contends the record shows that the SBA advised the Navy that it intended to issue a COC and

that, at least, as of August 10, when the Navy determined that award should be made to Contra Costa because of Ken Com's nonresponsibility, the Navy disagreed with the SBA's proposed determination. In these circumstances, Ken Com argues, the regulations required the Navy to seek resolution with the SBA Regional Office and failing that to appeal to SBA Headquarters in Washington in accordance with DAR § 1-705.4 (f)(ii). That, the protester contends, would have resulted in an automatic suspension of "any time period." On the other hand, Ken Com argues, if, as the Navy insists, it did not disagree with SBA's proposed action, it should have waited for SBA to finish its process.

We disagree with Ken Com's position that the suspension of the 15-day period provided in DAR § 1-705.4(f)(ii) is applicable to this matter. Basically, this provision sets forth a rather elaborate method of appeal to be used where a contracting officer has a "substantial doubt as to a concern's ability to perform" despite the SBA's conclusion that a COC is appropriate. See DAR § 1-705.4(a). The scheme in DAR § 1-705.4(f)(ii) is set in motion when an SBA field office proposes to issue a COC and the contracting officer still believes that the firm will not be able to perform. In such a case the matter is to be referred to the SBA Headquarters and if the Headquarters affirms the field office's determination the agency is then permitted to submit a formal written appeal to the SBA. Only in the event the contracting officer requests that the field office suspend action and forward the matter to SBA Headquarters does the suspension of the 15-day period become operative.

We are unable to find anything in the record which indicates that the Navy at any point concluded that it would not accept a COC as conclusive of Ken Com's responsibility or that it disagreed with SBA's proposed action at any level. The Navy's August 10 determination to award to Contra Costa does not, in our view, reflect disagreement with possible COC issuance for Ken Com, but only that the anticipated COC was not forthcoming within the predicted time frame. The fact that the matter was transferred from SBA's District Office to its Regional Office and finally to its Washington Headquarters was not because of any Navy disagreement with the inclination and recommendations of the lower level SBA offices, but merely

because SBA's rules required Headquarters approval of COCs issued in procurements above \$500,000. Since the contracting officer did not appeal to SBA Headquarters and certainly was not obligated to file an appeal, the process set forth in DAR § 1-705.4(f)(ii) was not activated and the matter was governed by the "normal procedures" set forth in DAR § 1-705.4(c) and (e).

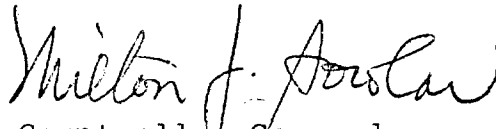
Although these provisions envision close cooperation and communication between the SBA and the agency during the COC process and provide for notification to the agency by the SBA field office if it plans to issue a COC or refer the matter to Washington, we do not believe that these provisions require the agency to withhold award for more than the specified 15-day period. In this regard, we have held that advice from an SBA field office that a COC would issue where final approval was required from the Washington Office is advisory and not of such effect as to prevent the agency from making an award to another bidder. See B-170102, December 2, 1970. Thus, although the Navy appears to have been advised by SBA field office personnel that a COC likely would issue, we are unable to find that the Navy's actions in determining on August 10 that award should be made to Contra Costa and in actually awarding the contract to that firm on August 21 were improper. Likewise we do not believe, as the protester argues, that the agency was obligated by law or "principles of fairness" to request bidders to further extend their bids in order for the SBA to complete the COC process.

Ken Com also argues that the Navy's initial determination of nonresponsibility is "totally devoid of any merit." The protester argues that the Navy's conclusion that Ken Com is not capable of performing the work is refuted by the fact that another Federal agency has contracted with Ken Com to do virtually the same work as that required under this solicitation.

The SBA has the authority to conclusively determine that a small business concern is responsible. 15 U.S.C. 637(b)(7) (Supp. I 1977). This Office has no authority

to review SBA's determination to require issuance of a COC, or to reopen a case where a COC has been denied unless the protester has made a prima facie showing of fraud or willful disregard of facts. See SMI/New York; Sweepster, Inc., B-194009, July 24, 1979, 79-2 CPD 55. The regulation, DAR § 1-705.4(c), provides that in most instances SBA must issue a COC within 15 days after the matter is referred to it or the agency may award the contract to the next low bidder. In this case SBA was given the opportunity to decide the matter but did not complete the process within the 15-day period and the Navy did not act improperly in then awarding the contract to Contra Costa after withholding award for a time in excess of the required 15-day period. Under the circumstances, since the agency authorized by law to determine Ken Com's responsibility was given the required opportunity to do so, we do not believe it would be appropriate for us to now review the matter of Ken Com's responsibility.

The protest is denied.



For the Comptroller General
of the United States